The Unconstitutionality of the Notice Provision of the Texas Probate Code

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The idea that every man is entitled to his day in court and that he should be given fair notice of this right was not initially inherent in probate proceedings.[1] Prior to the seventeenth century, death itself was considered to put the interested parties on notice of the probate proceeding since the entire family or clan was usually located in a single community. During the seventeenth century in England, the probate proceeding was placed in the hands of the ecclesiastical courts and notice was given to the parties if and when the courts decided to give it.[2] This concept of notice was brought to the United States by the English colonists and in many areas has remained basically unchanged until the present time.[3] The general concept of fair notice began to change, however, in the twentieth century. This trend culminated in a landmark decision by the United States Supreme Court in *Mullane v. Central Hanover Bank & Trust Co.*,[4] which held that the notice given must, "under all circumstances . . . apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[5] Since *Mullane* involved an in rem proceeding, in which service of process by publication had traditionally been deemed to satisfy due process requirements, many states have changed the notice provisions of their probate codes to comply with its holding.[6] However, several states, including Texas, have retained archaic systems of notice based on the early English legal traditions.[7] While arguments may be made for the validity of the old law, the more reasoned approach is that such a system is not only outmoded but is violative of modern constitutional concepts of due process of law.[8] The states with such statutes soon may find that sister states will not grant full faith and credit[9] to their probate decrees. Similarly, both resident and nonresident interested parties may collaterally attack the jurisdiction of the court entering a decree which affects their personal rights. This Comment will examine the question of whether Texas may maintain its present probate notice provision or whether it must adopt, either by legislative enactment or judicial interpretation, a standard of notice comparable to that required by *Mullane*.

I. THE MULLANE DOCTRINE: ITS DEVELOPMENT AND EFFECT

Pre-Mullane. It is necessary to look to the cases decided before *Mullane* in

[1] Comment, *Probate Proceedings—Administration of Decedents' Estates—The Mullane Case and Due Process of Law*, 50 MICH. L. REV. 124, 130 (1951).
[2] *Id.*
[3] A. REPPY & L. TOMPKINS, THE LAW OF WILLS 19-180 (1928); Comment, *supra* note 1, at 130.
[4] 339 U.S. 306 (1950).
[5] *Id.* at 314.
[6] *See* text accompanying notes 77-83 *infra*.
[7] *See* text accompanying notes 49-60, 64-76 *infra*.
[8] U.S. CONST. amends. V, XIV.
[9] U.S. CONST. art. IV, § 1.

order to obtain a true picture of how the doctrine of fair notice has developed. Two cases illustrate that the concept of "best possible notice" was initially argued in actions against domiciliaries where notice by publication had formerly been deemed sufficient to meet the requirements of due process. The case which served as the basis for *Mullane* is *McDonald v. Mabee*,[10] a 1917 case originating in Texas. A party domiciled in Texas left the state intending to make his home elsewhere. His family, however, remained in Texas. During his absence an in personam action on a promissory note was brought against him and service in the action was by publication in a Texas newspaper after his final departure. Based on this service, a personal judgment was sustained by the Supreme Court of Texas.[11] The United States Supreme Court overruled the state court and held that "an advertisement in a local newspaper is not sufficient notice to bind a person who has left a state, intending not to return. To dispense with personal service the substitute that is most likely to reach the defendant is the least that ought to be required if substantial justice is to be done."[12] The Court added that a sister state is not obliged to give full faith and credit to a judgment which is void in the state where it was rendered.[13] *McDonald v. Mabee* involved an in personam judgment; yet it seems to be a forerunner of *Mullane* if Mr. Justice Jackson's words are taken at face value.[14]

The idea that notice must meet the tests of fair play and substantial justice was carried forward in 1940 in the case of *Milliken v. Meyer*,[15] another in personam action. The dispute concerned an interest in profits from Colorado oil royalties. A Wyoming court rendered a judgment against Meyer who was domiciled in Wyoming and who had been personally served with process in Colorado pursuant to the Wyoming statutes.[16] Milliken sought to have the Wyoming judgment given full faith and credit in Colorado. Meyer then brought suit in Colorado alleging that the Wyoming judgment was a nullity for want of jurisdiction over his person or property. The Colorado court refused to give full faith and credit to the Wyoming holding.[17] On appeal to the United States Supreme Court it was held that "if the Wyoming Court had jurisdiction over Meyer, the holding by the Colorado Supreme Court that the Wyoming judgment was void because of an inconsistency between the findings and the decree was not warranted."[18] The Court stated that domicile in a state is sufficient to bring an absent defendant within a state's jurisdiction for a personal judgment based on the appropriate substituted service. The Court further held that: "Its adequacy so far as due process is concerned is dependent on

[10] 243 U.S. 90 (1917).
[11] 107 Tex. 139, 175 S.W. 676 (1915).
[12] 243 U.S. 90, 92 (1917).
[13] *Id.* at 91.
[14] "[W]e think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 312 (1950).
[15] 311 U.S. 457 (1940).
[16] Wyo. R. Civ. P. 4(e)(6), 4(l) (1959).
[17] Meyer v. Milliken, 101 Colo. 564, 76 P.2d 420 (1937); Meyer v. Milliken, 105 Colo. 532, 100 P.2d 151 (1940).
[18] Milliken v. Meyer, 311 U.S. 457, 462 (1940).

whether or not the form of substituted service provided for such cases and employed is reasonably calculated to give him actual notice of the proceedings and an opportunity to be heard."[19]

Mullane. Mullane v. Central Hanover Bank & Trust Co.[20] involved a New York trust company which had exclusive management and control of a common trust fund under New York law.[21] The assets of many small trusts were to be invested by the company in the common fund, and the beneficiaries of the small trusts were both residents and nonresidents of the state of New York. The company petitioned under the statute for a judicial settlement of accounts which would be binding and conclusive as to any matter therein upon everyone having any interest in the common fund or in any participating trust. The only notice of this action given to the beneficiaries was by publication in a local newspaper pursuant to the New York Banking Law.[22] The newspaper publication merely set forth "the name and address of the trust company, the name and date of the establishment of the common trust fund, and a list of all participating estates, trusts or funds."[23] The appellant appeared specially and contended that "the statutory provisions for notice to [the] beneficiaries were inadequate to afford due process under the Fourteenth Amendment, and therefore that the court was without jurisdiction to render a final and binding decree."[24] The appellant's objections were entertained and overruled by the surrogate court on the grounds that the required notice had been given and that such notice was sufficient to satisfy the requirements of due process of law.[25] Following an affirmation of the holding by the appellate division of the supreme court[26] and the court of appeals of the state of New York,[27] the United States Supreme Court considered the case on appeal.

The Court began its opinion by stating that "American courts have sometimes classed certain actions as *in rem* because personal service of process was not required, and at other times have held personal service of process not required because the action was *in rem*."[28] The discussion of the various distinctions between in rem, quasi in rem, and in personam, halted abruptly when the Court stated that "in any event we think that the re-

[19] *Id.* at 463.

[20] 339 U.S. 306 (1950).

[21] Law of July 1, 1950, § 100-c N.Y. Banking Law (amended 1951).

[22] Law of July 1, 1950, § 100-c(12) N.Y. Banking Law (amended 1951) states:

> After filing such petition the petitioner shall cause to be issued by the court in which the petition is filed and shall publish not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund and in such estates, trusts or funds mentioned in the petition, all of which may be described in the notice or citation only in the manner set forth in said petition and without setting forth the residence of any such decedent or donor of any estate, trust or fund.

[23] 339 U.S. 306, 310 (1950).

[24] *Id.* at 311.

[25] 75 N.Y.S.2d 397 (1947).

[26] 88 N.Y.S.2d 907 (1949).

[27] 299 N.Y. 697, 87 N.E.2d 73 (1949).

[28] 339 U.S. 306, 312 (1950). *See* cases collected in A. FREEMAN, JUDGMENTS § 1517 (5th ed. 1925).

quirements of the Fourteenth Amendment of the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state."[29] The Court reasoned that regardless of whether the proceeding is in rem or in personam the parties should be provided the full opportunity to appear and be heard. Thus, in balancing the state interest in a speedy, orderly notice provision against the individual interest sought to be protected by the fourteenth amendment,[30] the Court reasoned that the fundamental requisite of due process of law is the opportunity to be heard and that the right to be heard is of little value unless adequate notice is given.[31] The Court held that the New York statute violated the fourteenth amendment in that it deprived the known beneficiaries of substantial property rights by its failure to give adequate notice. Notice must be reasonable and it must be the best possible under the circumstances of each case.[32]

Post-Mullane. The logical process of extending the *Mullane* doctrine to other areas of law was initiated by the Court in *Walker v. City of Hutchinson*[33] and *Schroeder v. City of New York*,[34] two in rem proceedings involving notice in suits for the condemnation of land. In *Walker* the city filed an action to condemn a part of the appellant's land for public use under the applicable statute.[35] No notice of a hearing was given except by publication in the city newspaper although the owner was a resident of the state in which the hearing was held and his name and address were available to the city. Reasoning from the fourteenth amendment, the Court extended the *Mullane* decision to state residents[36] in eminent domain proceedings by holding that due process requires that an owner whose property has been taken for public use must be given a hearing to determine just compensation. Observing that the right to such a hearing is meaningless without notice, the Court applied the *Mullane* doctrine which requires that notice must be of a type which reasonably informs parties of proceedings which may adversely affect their legally protected interest.

> Measured by the principles stated in the *Mullane* case, we think that the notice by publication here falls short of the requirements of due process. . . . Nothing in our prior decisions requires a holding that newspaper publication

[29] 339 U.S. at 312.

[30] U.S. CONST. amend. XIV, § 1 states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, *without due process of law*; nor deny to any person within the jurisdiction the equal protection of the laws.

(Emphasis added.)

[31] *See* Grannis v. Ordean, 234 U.S. 385, 394 (1914).

[32] *See* Milliken v. Meyer, 311 U.S. 457 (1940); Grannis v. Ordean, 234 U.S. 385 (1914); Priest v. Las Vegas, 232 U.S. 604 (1914); Roller v. Holly, 176 U.S. 398 (1900).

[33] 352 U.S. 112 (1956).

[34] 371 U.S. 208 (1962).

[35] Law of March 29, 1937, ch. 227, § 1, Kan. Laws (repealed 1963).

[36] States have often felt that they could take greater advantage of their own residents than of nonresidents. *See, e.g.*, Walker v. City of Hutchinson, 352 U.S. 112, 115-16 (1956).

under the circumstances here provides adequate notice of a hearing to determine compensation.[37]

The Court has continued to expand the notice requirement over the past decade. In *Schroeder*[38] the Court reaffirmed the reasoning used in *Walker* and cited several cases as authority for its position.[39] The case again involved compensation for property acquired by a city government and the failure to give the appellant proper notice of the proceedings. The language used by the Court emphasized its determination to extend the fourteenth amendment concept of due process to the area of eminent domain. "The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly protected by the proceedings in question."[40]

While the *Mullane* doctrine had been extended to residents of the forum state in suits involving eminent domain, the Court used a Texas case to extend the doctrine of sufficient notice to an adoption proceeding which has been considered an in rem action.[41] In *Armstrong v. Manzo*[42] a husband and wife were divorced by a Texas court. Custody of the couple's child was granted to the mother; the father was ordered to pay child support. The mother married the respondent and two years later he sought to become the child's adoptive father. Texas law requires the natural father's written consent for adoption, but an exception exists if he has not contributed to the child's support for two years commensurate with his ability.[43] The proper affidavit and petition for adoption were filed, but no notice of the proceedings was given to the father even though his whereabouts was well known to the respondents. An adoption decree was entered and the father sought to annul the decree on the ground that it was entered without notice. The Texas court of civil appeals upheld the decree.[44] The United States Supreme Court held that the decision of the Texas court deprived the father of his constitutional rights because "the notice of the pending adoption proceedings violated the most rudimentary demands of due process of law."[45]

While the Texas court recognized the rule in *Mullane*, it felt that the infirmity created by the failure to give notice to the father had been cured by the subsequent hearing afforded him upon his motion to set

[37] 352 U.S. 112, 116 (1956).

[38] 371 U.S. 208 (1962).

[39] Walker v. City of Hutchinson, 352 U.S. 112 (1956); New York v. New York, N.H. & H.R.R., 344 U.S. 293, 296 (1953); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 318 (1950); Milliken v. Meyer, 311 U.S. 457 (1940); Grannis v. Ordean, 234 U.S. 385 (1914); Priest v. Las Vegas, 232 U.S. 604 (1914); Roller v. Holly, 176 U.S. 398 (1900).

[40] 371 U.S. 208, 212-13 (1962).

[41] Armstrong v. Manzo, 380 U.S. 545 (1965); Adoption of Armstrong, 371 S.W.2d 407 (Tex. Civ. App. 1963), *error ref. n.r.e.*; H. CLARK, DOMESTIC RELATIONS 608 (1968). The better view would be to consider adoption a status over which the court could acquire jurisdiction. This view has not been popular in the United States although it has been discussed in some cases. *See* Williams v. North Carolina, 317 U.S. 287, 297-98 (1942).

[42] 380 U.S. 545 (1965).

[43] If the nonsupport element is present, the juvenile court judge in the county of the child's residence may give his approval for adoption. TEX. REV. CIV. STAT. ANN. art. 46a, § 6 (1969).

[44] Adoption of Armstrong, 371 S.W.2d 407 (Tex. Civ. App. 1963), *error ref. n.r.e.*

[45] Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

aside the decree.[46] However, this reasoning is subject to attack on the ground that the respondents would have had the burden of proving their case against the father's defenses if he had appeared in the original proceeding. Instead, the burden of proof was placed on the father to overcome a decree entered by one judge based on a finding of nonsupport made by another judge.[47] Thus, the problem of the shifting burden of proof can defeat any curative measures which are argued to correct the shortcomings of the statute.[48]

II. The Texas Probate Code Provision

Reasoning similar to that used in *Walker v. City of Hutchinson* and *Armstrong v. Manzo* could clearly be used by the United States Supreme Court to extend the *Mullane* requirements of adequate notice to probate proceedings should the opportunity arise. Nevertheless, the Texas legislature and judiciary have not seen fit to anticipate such a decision and have elected to maintain the present notice provision of the Probate Code.[49] The provision states: "When an application for the probate of a written will produced in court, or for letters of administration, is filed with the clerk, he shall issue a citation to all parties interested in such estate, which citation shall be served by posting . . . ."[50] The citation itself states that the application has been filed, the names of the deceased and the party who is the applicant, the time the application is to be acted upon, and that anyone interested in the estate may appear and challenge the application.[51]

The notice provision of the Probate Code has been considered by the Texas courts on a number of occasions. However, the actual question of whether or not the provision violates the due process clause of the fourteenth amendment apparently has not been raised. Although the notice provisions of the Probate Code were not directly in issue in the 1950 decision in *Nass v. Nass*,[52] the Texas supreme court clearly defined the guidelines to be followed in the consideration of the "notice by publication" provisions of the Texas Rules of Civil Procedure.[53] The court observed that notice by posting or publication is inexpensive and stated that "the rules governing the issuance of writs and process were cumbersome, and in many instances several alias citations had to be issued before service was

[46] *Id.* at 551, quoting Adoption of Armstrong, 371 S.W.2d 407 (Tex. Civ. App. 1963), *error ref. n.r.e.*

[47] 380 U.S. at 551.

[48] An analogy can be drawn to probate in Texas on the point of the shifting burden of proof. Case law has held that the burden of proof prior to a probate proceeding is placed upon the proponent of the will. Seigler v. Seigler, 391 S.W.2d 403 (Tex. 1965); Watson v. Watson, 340 S.W.2d 344 (Tex. Civ. App. 1960), *error dismissed*. Once the will has been probated the burden shifts and is placed on the one who is contesting the validity of the will in the district court. Chalmers v. Gumm, 154 S.W.2d 640 (Tex. Comm'n App. 1941); Friedrichs v. Reinhardt, 370 S.W.2d 739 (Tex. Civ. App. 1963); Robinson v. Compton, 313 S.W.2d 550 (Tex. Civ. App. 1958); Jordan v. Virginia Military Institute, 296 S.W.2d 952 (Tex. Civ. App. 1956); Kelso v. Hawkins, 293 S.W.2d 807 (Tex. Civ. App. 1956), *error ref. n.r.e.*; Cryer v. Duren, 164 S.W.2d 752 (Tex. Civ. App. 1942); Howley v. Sweeney, 288 S.W. 602 (Tex. Civ. App. 1926).

[49] Tex. Prob. Code Ann. § 128(a) (1956).

[50] *Id.*

[51] *Id.*

[52] 149 Tex. 41, 228 S.W.2d 130 (1950).

[53] Tex. R. Civ. P. 15, 101, 118 (1967).

obtained as required by law. By the adoption of Rules 15 and 101 the procedure was simplified and the cost to litigants materially reduced . . . ."[54] The court went on to equate the civil notice provisions with those of the Probate Code.

The notice provisions of the Code were specifically challenged in *Mitchell v. Mitchell*,[55] a 1950 case decided by a court of civil appeals. The attack was based on an allegation that notice by posting was an insufficient means of notification. An amended application for probate had been filed with the county clerk who issued a notice directed "To any Sheriff or Constable within the State of Texas."[56] The sheriff received the notice the day it was issued and executed it by posting a copy for ten days. The notice stated that the amended application would be heard "at which time all persons interested in said estate are required to appear and answer said application should they desire to do so."[57] The court expressly rejected *Mitchell v. Rutter*,[58] a 1949 court of civil appeals decision, and held that a notice which was addressed to the sheriff or constable of the county in which the probate proceeding was pending was valid.[59] Thus, it would appear that the issue of the validity of Texas notice procedure in probate was settled in *Mitchell v. Mitchell*. This decision continues to be the law in Texas today.[60]

III. The Notice Provisions of Other States

Texas does not stand alone as a state whose Probate Code notice provision is in apparent violation of the due process clause of the fourteenth amendment. A number of other states also have provisions which fail to meet the standards of fair notice as defined by the Supreme Court in *Mullane*.[61] In contrast, there are jurisdictions which have adopted statutes which follow the constitutional standards set forth in *Mullane*.[62] A third group of states have valid statutes, but interpret them in such a manner as to render them violative of due process.[63]

Statutes Violative on Their Face. A state representative of the group whose statutes are violative of due process on their face is Iowa. Its statute is akin

[54] 149 Tex. 41, 44, 228 S.W.2d 130, 131 (1950).
[55] 233 S.W.2d 187 (Tex. Civ. App. 1950).
[56] *Id.* at 188.
[57] *Id.* at 189.
[58] 221 S.W.2d 979 (Tex. Civ. App. 1949). *Rutter* held that notice to the children of the deceased in a probate proceeding by posting was invalid and that the children were not subject to a probate they did not know about. The court, citing City of Corpus Christi v. Scrugg, 89 S.W.2d 458 (Tex. Civ. App. 1936), stated: "The general rule is that statutes relating to service of process are mandatory and that a default judgment based upon a citation and service not complying with the statutes is void where the defect is apparent upon the face of the record." 221 S.W.2d at 980-81.
[59] 233 S.W.2d 187, 189 (Tex. Civ. App. 1950).
[60] Fortinberry v. Fortinberry, 326 S.W.2d 717 (Tex. Civ. App. 1959), *error ref. n.r.e.*
[61] Ark. Stat. Ann. §§ 62-2107, -2110, -2112 (1967); Idaho Code Ann. § 15-206 (1948); Iowa Code § 633.293 (1964); Ky. Rev. Stat. §§ 394.180, 394.220 (1969); La. Code Civ. Proc. Ann. arts. 2857, 2932, 2971 (West 1961); Miss. Code Ann. §§ 503, 505 (1957); Neb. Rev. Stat. §§ 30-217, -1904 (1965); S.C. Code Ann. § 19-253 (1962).
[62] Mich. Comp. Laws § 701.32 (1968); Wash. Rev. Code Ann. § 11.76.040 (1967).
[63] N.M. Stat. Ann. § 30-2-4 (1954); Tenn. Code Ann. § 32-207 (1955).

to the Texas provision, except that notice by publication is substituted for the notice by posting found in the Texas Code. The Iowa statute states:

> Upon the filing of a petition for probate of a will, the date for proving it shall be fixed by the court or the clerk, and the clerk shall give notice addressed TO ALL WHOM IT MAY CONCERN, signed by him, of such time fixed, by one publication in a daily or weekly newspaper published in the county where the will is filed, the publication to be at least seven days prior to the time fixed for such hearing.[64]

The Iowa statute was challenged in the case of *In re Pierce's Estate*.[65] The question considered by the court was whether the Iowa statute gave adequate notice to the heirs. The court held that an order admitting a will to probate after the clerk of the district court prescribed notice of the time fixed for probate by one publication in a daily newspaper and the posting of notices in three public places did not violate due process. "We think the Mullane decision does not require a holding that the order for notice and likewise Code section 633.20 [New 633.293] which authorizes such a notice, as well as the admission of the will to probate, were void for lack of due process."[66] The court reasoned that the provision was constitutional because the heirs could institute original proceedings to set aside the order of the probate court at any time within two years from the time the will was filed for probate. This reasoning, however, fails to remedy the violation created by the unconstitutional statute.[67]

South Carolina's statute[68] provides for the probate of a will without any notice whatsoever being given to the interested parties. The code does contain a curative provision,[69] but this law meets the same argument that was made in *Armstrong* concerning the shifting burden of proof.[70] The statute provides:

> Without citing or calling before him such as have interest, the judge of probate may (a) examine one or more of the subscribing witnesses thereto, (b) may take proof of the handwriting of the testator and one of the subscribing witnesses in case of their death or their removal from the State or when their whereabouts are unknown or (c) may receive any other secondary evidence admissible and sufficient by the rules of common law and if such proof shall satisfy the judge of probate that the paper is the last will and testament of the deceased he shall admit it to probate in common form.[71]

There is little doubt that the statutes of Iowa and South Carolina fail to meet the minimum standards of due process of law. In upholding a statute[72] similar to that of Iowa the Washington supreme court in *In re Shew's Estate*[73] held that "[t]he *Mullane* case was a proceeding *in personam* in-

[64] IOWA CODE § 633.293 (1964).
[65] 245 Iowa 22, 60 N.W.2d 894 (1953).
[66] 60 N.W.2d at 897.
[67] *See* text accompanying notes 46-48 *supra*.
[68] S.C. CODE ANN. § 19-253 (1962).
[69] *Id.* § 19-255.
[70] *See* text accompanying notes 46, 48 *supra*.
[71] S.C. CODE ANN. § 19-253 (1962).
[72] WASH. REV. CODE § 11.76.040 (1967).
[73] 48 Wash. 732, 296 P.2d 667 (1956).

volving trust funds held in a fiduciary capacity. The proceeding herein is *in rem*."[74] Such a statement, however, is not supported by the language of the Court in *Mullane*;[75] it is in fact, a direct misinterpretation of the *Mullane* language. The Washington statute has recently been amended by adding a provision calling for notice to be given to all interested persons whose names and addresses are known.[76]

Statutes Constitutional on Their Face. While some states' notice provisions do violate the fourteenth amendment concept of due process, other states have adopted statutes which follow the constitutional standards. Michigan was one of the first to adopt the Supreme Court guidelines in 1951, and its statute[77] can serve as a model for those states whose codes are in need of reform. The statute provides for service of process by delivery to the person by registered mail or by publication. This statute certainly provides for the best notice possible under the circumstances. The case of *Daft v. John & Elizabeth Whiteley Foundation*[78] discussed the requirements of notice in Michigan. The court held:

> Despite the fact that in many states wills may be probated without the necessity for notice to the heirs at law or other interested parties, it being a proceeding *in rem*, and not *in personam*, in others including Michigan, the

[74] *Id.* at 669.

[75] *See* text accompanying notes 28, 29 *supra.*

[76] WASH. REV. CODE § 11.76.040 (1967).

[77] MICH. COMP. LAWS § 701.32 (1968) reads as follows:

> Except as otherwise provided by law, all probate and other legal notices required by law or by the probate judge of any county to be served upon any party, shall be served as the court shall direct; either
>
> (a) By delivering a copy of the same at least 5 full days before the day of hearing personally to such party if he can be found within the county, and in case personal service in the manner provided in this subsection is required, the order shall also specify the names of all persons upon whom such service shall be made; or
>
> (b) By publishing once in each week for 3 weeks consecutively in some newspaper printed and circulating in the county where said probate judge holds court, if there be one printed and circulating in said county; and in case there be no newspaper printed and circulating in said county, then some newspaper published in an adjoining county and circulating in the county where the proceedings are pending: Provided, however, that the last day of publication shall be at least 2 full days prior to the date set for hearing in such order and notice: Provided further, That if any attorney shall have entered his appearance in writing for any party in any matter pending in said court, all notices required to be given to said party in said matter shall be served on said attorney, in the same manner as provided for service of pleadings in suits pending in circuit court, and such service shall be in lieu of service upon the client for whom said attorney appears.
>
> In all cases where notice has been given solely by publication, as aforesaid, copies of such notice shall be sent by the petitioner, fiduciary or his attorney by registered or certified mail, with return receipt demanded, at least 14 days prior to the time appointed therein for hearing, to all persons appearing at the time of such mailing from the records of the estate or proceeding with respect to which such notice is given to have an interest therein, and such copies shall be mailed as aforesaid to the persons entitled thereto at their respective last known addresses: Provided, however, That such service by registered or certified mail may be dispensed with whenever the names or addresses of such interested persons are unknown and cannot be ascertained by the exercise of reasonable diligence or whenever such interested persons are unborn, unascertained or have only contingent future interests, or have signed a petition for an order of said court with respect to which such notice by registered or certified mail would otherwise be required, or by writing filed in said court have waived such notice; or
>
> (c) Solely by registered or certified mail in the manner above provided where the names and addresses of the persons required to be served are known.

[78] 365 Mich. 6, 108 N.W.2d 893 (1961).

> governing statutes require some sort of notice. . . . [I]n a petition that the will be admitted to probate, the petitioner must state the names and addresses of heirs . . . if known.[79]

Many states, like Michigan, have gone farther and extended notice not only to nonresidents, but to residents as well.[80] Washington has amended its statute to meet the requirements of due process by adding to its former provision[81] a paragraph which does not distinguish between residents and nonresidents. This method of reform appears to be the most desirable.

A need for uniformity to insure adequate notice in probate proceedings is evident. A state statute should at least meet the minimum requirements of due process with regard to nonresidents as stated in *Mullane*. The fact that the statute may violate the due process clause of the state constitution[82] and may fail to provide adequate notice to residents of the state was not considered in *Mullane*. The *Mullane* doctrine applies the protection of the due process clause of the Federal Constitution only to nonresidents of a state.[83] The later eminent domain and adoption cases extend it to the residents of a state, and most new state statutes on notice contain this extension.

States Which Interpret Statutes in a Violative Manner. At least two states have attempted to provide notice in accordance with due process by statute yet have failed to do so because their courts have interpreted the statutes unconstitutionally.[84] The New Mexico statute provides for notice in a constitutional manner.

> If it shall appear from the affidavit of the person producing the will for probate or otherwise from the files in said proceeding that any of the interested parties are non-residents of the state of New Mexico, a copy of such notice of probate shall be mailed to each of those whose residence is shown in such affidavit or can be otherwise ascertained from the files in such proceeding, at least ten (10) days before the date of hearing. Proof of personal service of such notice shall be made by the certificate of the officer serving the same or by affidavit of the person serving the same when such service is made by a private person, or by acceptance of service filed in the proceeding, signed by the party to be served, if not a minor. Proof of publication and mailing shall be made in the same manner as in actions brought in the district court.[85]

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[79] 108 N.W.2d at 895, citing Simes, *The Administration of a Decedent's Estate as a Proceeding in Rem*, 43 MICH. L. REV. 675 (1945).

[80] *See, e.g.*, CAL. PROB. CODE § 1200 (West 1956); N.Y. SURR. CT. PROC. § 1409 (McKinney 1967).

[81] The new paragraph reads:

> Whenever a final report and petition for distribution, or either shall have been filed in the estate of a decedent and a day fixed for the hearing of the same, the personal representative of such estate shall, not less than twenty days before the hearing, cause to be mailed a copy of the notice of the time and place fixed for hearing to each heir, distributee, and, in addition, in the case of a will, to each person named therein, whose names and addresses are known to him, and proof of such mailing shall be made by affidavit and filed at or before the hearing.

WASH. REV. CODE § 11.76.040 (1967). Some states make this distinction, but it has been demonstrated that it is an invalid one. *See* notes 35, 37, and accompanying text *supra*.

[82] *E.g.*, TEX. CONST. art. I, § 19.

[83] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 311-12, 320 (1950).

[84] N.M. STAT. ANN. §§ 30-2-4 to -6 (1953); TENN. CODE ANN. § 32-207 (1956).

[85] N.M. STAT. ANN. § 30-2-6 (1953).

The New Mexico case of *In re Towndrow's Will*[86] is illustrative of an improper interpretation of a well drawn statute. In a proceeding to contest a will on the ground that the court had no jurisdiction to enter an order admitting the will to probate, no personal notice was given to the testatrix's nonresident heirs as was required by the statute.[87] Disregarding the statute, the New Mexico supreme court presumed that the names did not appear in the proponent's affidavit and could not be ascertained from the file of the probate proceedings. Therefore, the published notice given to the nonresident heirs was deemed sufficient. While the statutory provision is clearly constitutional because of a provision which follows it,[88] the case demonstrates how a court can interpret a statute in a manner which deprives it of its validity.

Another interesting point found in the *Towndrow* case is the statement by the court that "the giving of notice is not a jurisdictional requirement"[89] in New Mexico even though the statute contemplates that notice should be given. The reasoning is based on the fact that the proceeding in probate is an in rem action. The judgment is not void for failure to give notice but rather voidable.[90] The statute should be strictly followed so that the right to contest the will may not be lost due to a lack of notice. This statement by the court does not seem to be above argument, however, since the proceedings in *Walker* and *Schroeder*[91] were in rem, and in these cases the United States Supreme Court stated that notice was a jurisdictional requirement.

Tennessee has a similar statute[92] which provides for adequate notice. The statute is an example of careful planning, yet it too has been victimized by judicial interpretation. The leading case concerning notice in Tennessee, *Brown v. Harris*,[93] appears to minimize an important aspect of the state statute. The court held that, although parties in interest who had no notice ought not to be denied their right to contest, the probate should not be set aside merely because of the absence of process or notice from the record when the want of notice is not averred in the petition.[94] Thus, Tennessee, like New Mexico, appears to vitiate the strict notice requirements of its probate code.

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[86] 47 N.M. 173, 138 P.2d 1001 (1943).

[87] N.M. STAT. ANN. § 30-2-4 (1953).

[88] *Id.* § 30-2-6 states:

> If it shall appear from the affidavit of the person producing the will for probate or otherwise from the files in said proceeding that any of the interested parties are nonresidents of the state of New Mexico, a copy of such notice of probate shall be mailed to each of those whose residence is shown in such affidavit or can be otherwise ascertained from the files in such proceeding, at least ten (10) days from the date of hearing. Proof of personal service of such notice shall be made by the certificate of the officer serving the same or by the affidavit of the person serving the same when such service is made by a private person, or by acceptance of service filed in the proceeding, signed by the party to be served, if not a minor. Proof of publication and mailing shall be made in the same manner as in actions brought in the district court.

[89] 138 P.2d 1001, 1005 (1943).

[90] *Id.* at 1006.

[91] *See* text accompanying notes 33, 34 *supra.*

[92] TENN. CODE ANN. § 32-207 (1956).

[93] 68 Tenn. 386 (1876).

[94] *Id.* at 389.

IV. The Argument Against the Use of Mullane in Probate

While the argument for the use of the *Mullane* concept of adequate notice in probate is convincing, it is not without critics. A number of authors have argued that the *Mullane* concept of notice is inapplicable to a probate proceeding.[95] These advocates base their reasoning upon the historical development of the common law and a number of Supreme Court cases[96] which discuss the nature of a probate proceeding.

Probate is an in rem proceeding directed against property rather than persons.[97] Its purpose is to determine the interests of all persons, known or unknown, in the *res* and a valid judgment in rem is considered binding on the whole world. Even though the Court in *Mullane* attempted to disregard the distinctions between in personam and in rem,[98] they remain a part of our legal system and are used frequently by courts on all levels. The fact that probate is an in rem proceeding is used to argue that the *Mullane* doctrine is inapplicable, but the condemnation cases appear to destroy the force of this argument.[99]

Another more convincing argument concerns the course of development which American probate law has followed from its English heritage. Jurisdiction for probate in seventeenth century England was in the ecclesiastical courts,[100] and no notice was given of the probate of a will since it was primarily an administrative function. The English law did, however, provide a thirty-year period in which interested parties could come in and contest the probate.[101] This basic system is still used in some states today.[102] While some states have carried over the old English system intact, others have modified it to at least provide for notice by publication prior to probate.[103] Thus, the system of notice by publication or posting has been a part of our judicial system since colonial times.

Yet another argument that the notice provisions of the Texas Probate Code are adequate may be founded upon the line of cases handed down by the United States Supreme Court on this area of the law. These cases, decided several decades ago, are the only Supreme Court decisions on probate. They all are contrary to the holding in *Mullane*, but no probate case has been decided on the question of notice since *Mullane*.

The case of *Farrell v. O'Brien*,[104] decided in 1905, held that a one-year

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[95] 2 W. Page, Wills §§ 596, 597 (1941). Restatement of Judgments § 32, comment (f) (1942); Comment, *Probate Proceedings—Administration of Decedent's Estates—The Mullane Case and Due Process of Law*, 50 Mich. L. Rev. 124 (1951).

[96] Christianson v. King County, 239 U.S. 356 (1915); Michigan Trust Co. v. Ferry, 228 U.S. 346 (1913); Goodrich v. Ferris, 214 U.S. 71 (1909); Farrell v. O'brien, 199 U.S. 89 (1905); Culbertson v. H. Witbeck Co., 127 U.S. 326 (1888); Ellis v. Davis, 109 U.S. 485 (1883); Kieley v. McGlynn, 88 U.S. (21 Wall.) 503 (1875).

[97] 2 W. Page, Wills § 560 (1941); Restatement of Judgments § 32 (1942).

[98] *See* text accompanying notes 28-30 *supra*.

[99] *See* text accompanying notes 33-40 *supra*.

[100] E. Pollack & F. Maitland, History of the English Law 360-63, 331-48 (2d ed. 1911); A. Reppy & L. Tompkins, History of Wills 7, 101, 112 (1928); 2 W. Page, Wills §§ 562, 565 (1941).

[101] A. Reppy & L. Tompkins, History of Wills 159 (1928).

[102] *See* note 3 *supra*.

[103] Simes, *The Administration of a Decedent's Estate as a Proceeding in Rem*, 43 Mich. L. Rev. 675, 693 (1945).

[104] 199 U.S. 89 (1905).

period during which a will could be contested provided adequate due process under the fourteenth amendment. The appellant challenged the probate of a will on the ground that no notice was given as provided by the statute. Mr. Justice White stated:

> [T]he contention made on this subject amounts to asserting that every state law which provides for a probate in common form is repugnant to the due process clause of the constitution even though under state statutes full and adequate remedies are provided by which interested parties during a period of time prescribed by law, be heard in the probate proceedings to question the existence of a will or its probate.[105]

The Court had discussed this point in an earlier case,[106] and held that the Virginia probate notice provisions were constitutional. The dictum in this case demonstrates that the Court assumed *ex parte* procedures in the area of probate law were adequate and standard procedures.

A statute which provided for notice by publication or posting and a one-year period to contest the probate was the subject of controversy in *In re Broderick's Will*.[107] There Mr. Justice Bradley stated his approval for this statutory provision in holding: "In view of these provisions, it is difficult to conceive of a more complete and effective probate jurisdiction, or one better calculated to attain the ends of justice and truth."[108] He added that all interested parties could be notified in a probate proceeding and that they are charged with notice because of the nature of a proceeding in rem. Only a few years later the Court considered a Michigan case, *Culbertson v. H. Witbeck Co.*,[109] where an ancillary probate of a will whose interested parties were all nonresidents was at issue. The Court, approving of notice by publication, made no distinction between residents and nonresidents. This case is another example of notice by publication being considered a proper method for notification of heirs and legatees.

Questions have arisen concerning the necessity for notice in each phase of the probate proceeding. *Michigan Trust Co. v. Ferry*[110] involved an accounting which was required after the probate of an estate had begun. In this case the Court held that notice given at the beginning of the proceeding was sufficient to maintain jurisdiction throughout the entire proceeding and no new notice was needed for the accounting. Several states, however, provide for notice by publication at the various stages of probate.[111] At least two cases, *Christianson v. King County*,[112] decided in 1915, and *Goodrich v. Ferris*,[113] decided in 1909, have held that notice by publication is sufficient in the various stages of probate. The former case involved the hearing for the administrator's final accounting and the latter involved an executor's final accounting and distribution. In the latter case

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[105] *Id.* at 118.
[106] Robertson v. Pickell, 109 U.S. 608 (1883).
[107] 88 U.S. (21 Wall.) 503 (1874).
[108] *Id.* at 517.
[109] 127 U.S. 326 (1888).
[110] 228 U.S. 346 (1913).
[111] *Id.* at 353.
[112] 239 U.S. 356 (1915).
[113] 214 U.S. 71 (1909).

the Court held that the claim that the time for notice was unreasonable "was clearly unsubstantial and devoid of merit."[114] These cases all add weight to the argument that the Court has accepted the old concept that notice in probate by publication or posting does not violate due process.

Another argument against application of the *Mullane* doctrine of notice to probate proceedings is based on an 1883 Supreme Court case, *Ellis v. Davis*,[115] which is interesting not only for its legal concept but also for its historical background. A Louisiana matron willed her entire estate to Jefferson Davis, the former president of the Confederacy, who she said was the "highest and noblest [man] in existence."[116] The heirs at law and next of kin brought an action of revendication under Louisiana law to recover the property devised by the decedent to Davis. The action was brought in the federal district court in Louisiana and was not a probate proceeding, but a proceeding to have Davis removed from the land.

The Court decided that it did not have to consider the question of jurisdiction in a probate proceeding. "This action . . . was a subject of consideration in *Barrow v. Hunton* . . . but the present is not an action of that description, for the relief prayed for is a recovery of the possession of the inheritance, which . . . must be prosecuted in an action of revendication."[117] The suit was not an action for nullity, and the action of revendication furnished a "plain, adequate and complete remedy at law and consequently constitutes a bar to the prosecution of a bill in chancery."[118]

This case demonstrates a remedy at law which is available to those who are deprived of adequate notice in a probate proceeding. These deprived parties can bring a suit to have the party who inherited the property removed from the land. Thus, the party who did not receive notice is not without recourse. He can bring suit, not in a probate proceeding, but in a different proceeding before a federal court. Such an approach to the issue of procedural due process does, however, result in a multiplicity of suits. Similarly, the necessity of bringing a separate action may be criticized as prolonging litigation.

V. The Full Faith and Credit Problem

The various notice provisions found in the states' statutes give rise to a problem of conflict of laws.[119] The United States Constitution provides for full faith and credit between the states,[120] but this provision does not preclude an inquiry into the issue of the jurisdiction of the court rendering the judgment that is sought to be enforced in the sister state. An attempt to render a judgment without the proper jurisdiction is a violation of the

[114] *Id.* at 81.
[115] 109 U.S. 485 (1883).
[116] *Id.* at 488.
[117] *Id.* at 503, citing Barrow v. Hunton, 99 U.S. 80 (1879).
[118] *Id.*
[119] H. Goodrich & E. Scoles, Conflict of Laws 390-96 (1964).
[120] *Id.* at 395; U.S. Const. art. IV, § I.

due process clause,[121] and the judgment is void in the state where rendered and need not be given effect elsewhere.[122]

If there is no jurisdiction over the subject matter, then the judgment is void and the full faith and credit problem can be avoided. "American cases have treated lack of competence of the court as an absence of jurisdiction over the subject matter."[123] The assumption is that if a state had not authorized the court to assume jurisdiction over the point in litigation, the judgment will be neither enforced nor recognized.[124] However, mere irregularities or errors in the rendition of a judgment fail to create a lack of jurisdiction necessary to a defense when recognition of a judgment is sought in a sister state.[125]

If Texas probate proceedings continue to follow the present pattern of notice, the probate decree of a Texas court could be denied full faith and credit in a sister state. It may be argued that the notice provision of the Texas Probate Code[126] fails to provide adequate notice in accordance with the due process clause of the fourteenth amendment. Consequently, the court operating under this statute does not have jurisdiction to enter a decree in probate and any subsequent decree need not be accorded full faith and credit by sister states. Although the problem may not arise in suits between states whose statutes are equally violative of due process,[127] a Michigan court would not be likely to honor a Texas decree where posting was the method of notice used.

Another possible problem may arise concerning full faith and credit granted to a probate decree of a sister state. "A will admitted to probate as a valid will at the last domicile of the decedent should be conclusively recognized as valid (as to personalty) in all other states where the decedent left personalty and this is the general view of the authorities."[128] Some doubt exists, however, as to whether the result is imperatively demanded by the full faith and credit clause of the Constitution.[129] The difficulty arises when the state where the decedent was domiciled probates a will containing a valid testamentary disposition of property under its law and attempts to compel a second state which has actual control over the property to accept that testamentary disposition as valid. "[T]he only reason that an adjudication of the validity of the will at domicile is significant in another state where the property is left, is because the state of the situs looks to the domiciliary rules for distributing the dead man's estate."[130] It appears to be entirely within the power of the state to require every testamentary disposition of property found within its borders to be in-

[121] *See* notes 8, 30 *supra.*

[122] *See, e.g.*, Hanley v. Donoghue, 116 U.S. 1 (1885).

[123] H. GOODRICH & E. SCOLES, CONFLICT OF LAWS 396 (1964).

[124] Thompson v. Whitman, 85 U.S. (18 Wall.) 457 (1873).

[125] Chandler v. Peketz, 297 U.S. 609 (1936).

[126] TEX. PROB. CODE ANN. § 128(a) (1956).

[127] *See* text accompanying notes 64-76 *supra.*

[128] H. GOODRICH, CONFLICT OF LAWS 525 (1949), and cases cited therein. The Texas case of Barney v. Huff, 326 S.W.2d 617 (Tex. Civ. App. 1959), *error ref. n.r.e.*, demonstrates how the full faith and credit question is avoided when the testator was not domiciled in the state rendering the probate decree.

[129] *See* note 9 *supra.*

[130] H. GOODRICH, CONFLICT OF LAWS 526 (1949).

terpreted according to its own principles. The probate of a will in a state not the last domicile of the decedent apparently will be conclusive elsewhere as to the disposition of property in that state only.[131] However, this reasoning may be subject to some modification because of the Uniform Probate Code.[132]

VI. Conclusion

The Texas Probate Code contains an outmoded, obsolete notice provision. The idea that notice can be adequately given by posting an announcement on a courthouse door is fallacious and unreasonable. Yet, the leading Texas cases[133] apply the statute as it is stated on its face and the constitutionality of the provision has never been severely tested. While Texas is not alone in its approach, it has failed to recognize modern developments in the concept of due process. Other states have made the same mistake, but most of these have sought to distinguish their concept of notice in probate from the standard of reasonableness and best possible notice as set forth in the *Mullane* decision.

The best argument against the use of *Mullane* in probate is the line of Supreme Court decisions[134] which have considered probate notice provisions akin to the Texas provision and found them to be constitutional. While none of these decisions is recent, they are the only decisions from the High Court concerning probate notice statutes. The Court has not considered the issue of probate notice provisions since the *Mullane* decision. The prior decisions on probate notice would seem overruled by *Armstrong*,[135] since they all stress the fact that a period is allowed for contest even though improper notice is given. The *Armstrong* case held that the burden of proof shifts, just as in probate, and thus there is an actual deprivation of due process.

The three other arguments against the use of the *Mullane* standard in probate are answerable. The in rem nature of the proceeding does not seem a valid distinction in light of the statement in the leading case to the effect that such distinctions should no longer exist; yet they still appear in many judicial opinions. Secondly, the historical argument can be answered simply by comparing modern America with seventeenth century England; people move at a faster pace with greater mobility. Finally, the argument based on the *Barrow*[136] and *Ellis*[137] cases also lacks strength. Although a party who was not given notice is not without a remedy in a court of law, the argument loses weight when taken in light of the fact that this remedy creates a necessity for a multiplicity of litigation, a problem our courts have sought to avoid.

Mullane was decided on a sound basis of prior Supreme Court decisions.[138]

[131] *Id.* at 526, citing *In re* Clark's Estate, 148 Cal. 108, 82 P. 760 (1964).
[132] Uniform Probate Code § 96.
[133] *See* text accompanying notes 52-60 *supra*.
[134] *See* note 96 *supra*.
[135] Armstrong v. Manzo, 380 U.S. 545 (1965).
[136] Barrow v. Hunton, 99 U.S. 80 (1879).
[137] Ellis v. Davis, 109 U.S. 485 (1883).
[138] *See* notes 10, 15 *supra*.

It set standards of notice that are both fair and realistic to all the parties concerned. The *Mullane* doctrine has been carried forward in later cases to a point where the holding permeates most areas of the law. One exception appears to be the probate proceeding. Perhaps the reason is because so many states today possess constitutional notice provisions in their probate codes. Another possibility is that few parties in states where the constitutional standard is not met have come forward to question the validity of the provision. The Supreme Court has stated that it "has not committed itself to any formula . . . determining when constructive notice may be utilized or what tests it must meet."[139] There is presently no set formula of what constitutes due process of law. In some areas of the law one standard is used and in others a different position may be taken. However, if a formula does exist it can be found in *Mullane*, and such a formula would provide clarity and certainly overshadow any loss in flexibility. The new idea adopted by the Court provides a new standard superior to the old one. To distinguish cases because of the area of the law in which they are found is to vary a stable formula.[140]

Thus, it appears the arguments for the use of the *Mullane* doctrine in probate by far outweigh those against it. States which follow the decision should not have to honor the decrees of the probate courts of sister states which do not provide adequate notice. In the situation where a state gives full faith and credit to a decree based on an invalid statute, the remedy lies in the United States Supreme Court. The only question left is how long it will be before this relic of another era will be challenged. Perhaps its demise is not too far in the future, for in an age when men can travel to the moon, it seems trivial to ask for a letter to be sent through the mail.

[139] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[140] Note, *Constitutional Law: Adequacy of Notice for Due Process: Section 100(c) of the New York Banking Law*, 36 CORNELL L.Q. 541, 547 (1951).